

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Elder Zacarias-Lopez,

Petitioner,

v.

Calvin Johnson,

Respondent.

Case No.: 2:20-cv-00175-KJD-BNW

Order

This is a federal habeas proceeding under 28 U.S.C. § 2254 in which Elder Zacarias-Lopez challenges his Nevada state conviction for murder with use of a deadly weapon. On October 23, 2020, respondents filed a motion to dismiss Zacarias-Lopez's habeas petition arguing that the petition is successive under 28 U.S.C. § 2244(b) and time-barred because it was not filed within one-year of the date his conviction became final as required by 28 U.S.C. §2244(d)(1)(A). ECF No. 17. Despite having over five months to respond, Zacarias-Lopez has not filed an opposition to the motion to dismiss. Finding respondents' arguments meritorious, the court will grant the motion.

In a previous habeas action in this court challenging his initial 2002 state court conviction for the same crime, the court granted Zacarias-Lopez habeas relief and ordered that he be provided with a new penalty hearing in state court. *Zacarias-Lopez v. Neven*, 2:05-cv-01156-

1 JCM-PAL; ECF No. 37. Zacarias-Lopez subsequently waived his right to a new hearing in state
2 court and, instead, negotiated a lesser sentence of 20 to 50 years with a consecutive like sentence
3 for use of a deadly weapon. ECF No. 20-32. The state district court entered an amended
4 judgment of conviction on April 5, 2012. ECF No. 20-35. The Nevada Supreme Court affirmed
5 the conviction and sentence on May 13, 2013. ECF No. 21-24.

6 In its initial screening order in this case, this court suggested that, due to the intervening
7 amended judgment of conviction, the petition herein was not a second or successive petition
8 notwithstanding the prior federal habeas proceeding (i.e., 2:05-cv-01156-JCM-PAL). ECF No. 8
9 at 2 (citing *Magwood v. Patterson*, 561 U.S. 320, 341-42 (2010), and *Wentzell v. Neven*, 674
10 F.3d 1124, 1127 (9th Cir. 2012)). The court overlooked, however, that Zacarias-Lopez had filed
11 an *additional* federal habeas petition in this court in 2015.¹ See *Lopez v. Williams*, 2:15-cv-
12 00042-APG-GWF. In that case, the court dismissed the petition with prejudice as untimely. *Id.*,
13 ECF No. 8. The Ninth Circuit Court of Appeals subsequently denied Zacarias-Lopez's request
14 for a certificate of appealability as to that decision. *Id.*, ECF No. 12.

15 Under 28 U.S.C. § 2244(3)(A), a petitioner may not file a second or successive habeas
16 petition without first obtaining from the appropriate court of appeals an order authorizing the
17 district court to consider the petition. Where a petition has been dismissed with prejudice as
18 untimely or because of procedural default, the dismissal constitutes a disposition on the merits
19 and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244(b).

20 *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d

21
22 ¹ In both his initial petition and his amended petition in this case, Zacarias-Lopez indicated that
23 he had filed a prior habeas action in this court, but he left blank the space on the court's habeas
form asking for the prior case number. ECF No. 9 at 2 and ECF No. 12 at 2. In screening the
petitions, the court mistakenly assumed case number 2:05-cv-01156-JCM-PAL was the only
prior case.

1 1049, 1053 (9th Cir. 2005). Because Zacarias-Lopez has not secured an order from the court of
2 appeals authorizing this action as required by § 2244(b)(3), this court is without jurisdiction to
3 consider his petition in this case. *See Burton v. Stewart*, 549 U.S. 147, 153 (2007).

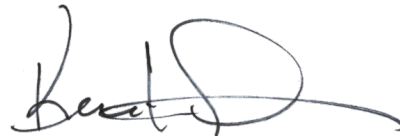
4 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 17) is
5 GRANTED. This case is DISMISSED for lack of jurisdiction. The Clerk shall enter judgment
6 accordingly and close this case.

7 **IT IS FURTHER ORDERED** that a certificate of appealability is DENIED as
8 reasonable jurists would not find dismissal for lack of jurisdiction to be debatable or wrong.

9 **IT IS FURTHER ORDERED** that respondents' motion for a seven-day extension of
10 time to respond to petition (ECF No. 16) is GRANTED *nunc pro tunc* as of October 16, 2020.

11 **IT IS FURTHER ORDERED** that petitioner's motion for a 60-day extension of time to
12 file a response to the motion to dismiss (ECF No. 23) is GRANTED *nunc pro tunc* as of
13 December 21, 2020.

14 Dated: April 7, 2021



U.S. District Judge Kent J. Dawson